

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

NICK POURZAL,)
)
Plaintiff,)
)
v.) Civ. No. 2001-140
)
MARRIOTT INTERNATIONAL, INC.,)
CAPITAL HOTEL MANAGEMENT, LLC and)
BLACKACRE CAPITAL MANAGEMENT, LLC,)
)
Defendants.)
_____)

MARRIOTT INTERNATIONAL, INC.,)
)
Defendant/)
Third-Party Plaintiff,)
)
v.)
)
PRIME HOSPITALITY CORP.,)
)
Third-Party Defendant.)
_____)

ATTORNEYS:

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For the defendant Capital Hotel Management, LLC

Maria Tankenson Hodge, Esq.

For the third-party defendant Prime Hospitality Corp.

Memorandum Opinion

GÓMEZ, Chief J.

Before the Court is the motion of the defendant, Marriot International ("Marriott"), to dismiss the Revised Third Amended Complaint (the "Complaint") of the plaintiff, Nick Pourzal ("Pourzal"), for failure to state a claim upon which relief can be granted. For the reasons set forth below, this Court will deny Marriott's motion as to Counts I, II, III, and VI of the Complaint, and grant Marriott's motion as to Counts IV, V, VII, and VIII.

I. FACTS

From 1985 to 1999, Prime owned and operated the Frenchman's Reef Beach Resort on St. Thomas (the "Reef").¹ During that time, Pourzal was employed as the General Manager and Chief Operating Officer of the Reef. The terms of Pourzal's employment were included in an employment agreement ("Employment Agreement"). The Reef also leased two apartment buildings, the properties known as the Band House and the Chef's House, a warehouse, a drug store, and a parking lot from Pourzal on a month-to-month basis.

¹ A review of the facts of this case can be found in this Court's 2004 decision on this matter. See *Pourzal v. Marriott Int'l, Inc.*, 305 F. Supp. 2d 544 (D.V.I. 2004).

In September, 1998, Prime and Marriott began negotiating a sale of the Reef. On August 8, 1999, Prime terminated Pourzal's employment. In an agreement (the "Sale Agreement") dated September 15, 1999, Prime agreed to sell the Reef to Marriott. The sale was finalized on March 15, 2000.

Marriott subsequently leased the Band House and the Chef's House properties from Pourzal. The Chef's House lease began on August 4, 2000, and terminated on August 4, 2001. The Band House lease began on August 27, 2001, and ran until August 27, 2002. The Band House lease included terms requiring Marriott to repair any damages resulting from its use of the Band House. It also included a clause extending the lease for sixty-day periods after the original term expired unless and until one party submitted a notice of termination. No such clause was included in the Chef's House lease. Marriott allowed the Band House lease to expire, and abandoned the property at the termination of the lease. On June 5, 2002, Marriott notified Pourzal of its intent to terminate the Band House lease. It abandoned that property after September, 2002.

On August 7, 2001, Pourzal filed a complaint against Marriott alleging tortious interference with prospective advantage, prima facie tort, and civil conspiracy. In a February, 2004, decision, this Court dismissed Pourzal's prima

facie tort and civil conspiracy claims, and allowed him leave to re-file his complaint. *Pourzal v. Marriott Int'l, Inc.*, 305 F. Supp. 2d 544, 548 (D.V.I. 2004). Pourzal subsequently filed an amended complaint, which alleged tortious interference with contracts, trespass, unjust enrichment, breach of contract, and intentional and negligent misrepresentation against Marriott. Pourzal also added CHM and BCM as defendants.²

Marriott subsequently filed the present motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. DISCUSSION

When considering a Rule 12(b)(6) motion, all material allegations in the complaint are taken as admitted, and the Court must construe all facts in a light most favorable to the non-moving party. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). All reasonable inferences are drawn in favor of the non-moving party. *Alston v. Parker*, 363 F.3d 229, 223 (3d Cir. 2004). A complaint should not be dismissed unless the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S.

² On September 2, 2004, Pourzal filed the Complaint, which corrected a mistake in defendants' names. On March 18, 2005, the Court granted a motion by Pourzal for leave to file the Complaint.

764, 810 (1993) (citing *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957)).

III. ANALYSIS

A. Tortious interference

In Count I, Pourzal alleges that Marriott tortiously interfered with Pourzal's Employment Agreement. In Count II, Pourzal alleges that Marriott tortiously interfered with the Band House and Chef's House leases, as well as with other contracts that Pourzal had with Prime.

To state a claim for tortious interference with contractual relations, a plaintiff must allege that: (1) a contractual relationship existed between the plaintiff and a third party; (2) the defendant knew about the contract; (3) the defendant intentionally and improperly interfered with the contract; (4) the interference was the proximate cause of one party to the contract failing to perform; (5) the defendant intended to harm the plaintiff by interfering with the contract; and (6) the non-performance resulted in harm to the plaintiff. See *Gov't Guar. Fund of Rep. of Finland (Skopbank) v. Hyatt Corp.*, 955 F. Supp. 441, 452 (D.V.I. 1997) (listing the elements of a claim for intentional interference with contract).

Pourzal has alleged that he and Prime had an employment contract. He has alleged that Marriott knew of that contract and

proximately caused Prime to breach it. He alleges that Marriott's actions were wrongful and made for the purpose of harming Pourzal. Pourzal also alleges that Marriott's actions caused him to suffer economic and emotional harm. These allegations are sufficient to state a claim for tortious interference with a contract. *See, e.g., id.*

In Count II, Pourzal alleges that he had lease agreements with Prime for the Band House and Chef's House properties, as well as other contractual agreements. He alleges that Marriott knew of the leases, and that Marriott acted in bad faith and with the intention to harm Pourzal by persuading Prime to cancel the Employment Agreement. Pourzal also alleges that Marriott's actions harmed him. Taking these allegations as true, Pourzal has stated a claim for tortious interference with contractual relations. *Id.*

B. Trespass

The Restatement (Second) of Torts § 158 provides:

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of another, if he intentionally (a) enters land in the possession of another, or causes a thing or third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.³

The trespass contemplated by the Restatement requires an intrusion upon the land "without the possessor's consent." Restatement (Second) of Torts § 158 cmt. c. Thus, a complaint for trespass must allege that the defendant entered the land of another without the possessor's consent or authorization. Restatement (Second) of Torts § 158 cmt. c.

In Count III, Pourzal alleges that after March 15, 2000, Marriott used and occupied property owned by Pourzal without his authorization or permission. Pourzal also alleges that Marriott remained on the land and refused to relinquish control. Pourzal further alleges that he has suffered damages due to Marriott's trespass. Taking these allegations as true, Pourzal has stated a claim for trespass upon which relief can be granted.⁴

³ "In the absence of local law to the contrary, the Restatement is the authoritative law." *Chase v. V.I. Port Auth.*, 3 F. Supp. 2d 641, 643 (D.V.I. 1998); 1 V.I.C. § 4.

⁴ Marriott argues that this claim is barred by a two-year statute of limitations. In the Virgin Islands, however, the tort of trespass upon real property carries a six-year statute of limitations. *Harthman v. Texaco (in Re*

C. Unjust Enrichment

"Unjust enrichment is typically invoked in a quasi-contractual setting, when [a] plaintiff seeks to recover from [a] defendant for a benefit conferred under an unconsummated or void contract." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 936 (3d Cir. 1999). To state a claim for unjust enrichment, a plaintiff must allege "that the defendant was enriched, that such enrichment was at the plaintiff's expense and that the circumstances were such that in equity and good conscience the defendant should return the money or property to the plaintiff." *Gov't Guar. Fund*, 955 F. Supp. at 460.

In Count IV, Pourzal alleges that Marriott trespassed upon Pourzal's land, and that the trespass unjustly enriched Marriott. Pourzal seeks compensatory damages, a declaration that Pourzal owns the land, and an injunction against further trespasses by Marriott as relief. The offensive conduct and resulting damages alleged in Pourzal's unjust enrichment claim are, in essence, identical to those in Pourzal's trespass allegations.

Tutu Wells Contamination Litig. I), 846 F. Supp. 1243, 1253-54 (D.V.I. 1993) (distinguishing the applicable statute of limitations for tortious injury to real property and trespass upon real property); 5 V.I.C. § 31(3)(C). Even if Pourzal's trespass claim accrued on September 15, 1999, as Marriott argues, and was first raised in 2003, only four years elapsed between the time of the alleged harm and the action.

This Court has dismissed tort claims that are duplicative or indistinct from other asserted claims. *See Moore v. A.H. Riise Gift Shops*, 659 F. Supp. 1417, 1426 (D.V.I. 1987) (dismissing a claim for prima facie tort where the "[p]laintiff . . . failed to plead any facts in Count VI to support a claim for another tort in addition to and distinct from the two previously alleged"). Pourzal alleges the same facts and harms in Counts III and IV, and seeks the same relief. Significantly, other than re-pleading the trespass already alleged in Count III, Pourzal has failed to allege the essential elements to plead unjust enrichment. Accordingly, and because Count IV is duplicative and materially indistinct from Pourzal's trespass claim alleged in Count III, Pourzal's unjust enrichment claim will be dismissed.

D. Breach of Lease

To state a claim for breach of contract, a party must allege that: (1) a contract exists; (2) one party to the contract breached a duty imposed by the contract; and (3) damages resulted from the breach. *See, e.g., Stallworth Timber Co. v. Triad Bldg. Supply*, 968 F. Supp. 279, 282 (D.V.I. App. Div. 1997) (stating the elements of breach of contract claim); *see also* Restatement (Second) of Contracts §§ 235, 237, 240 (stating that a breach of contract occurs when a party does not perform a material duty imposed by a contract).

According to the allegations in Count V, Pourzal and Marriott entered into a one-year lease agreement for the Chef's House property on August 4, 2000. The lease expired on August 4, 2001. Pourzal alleges that Marriott breached this lease by failing to pay rent for September, October, and November of 2001. However, Pourzal does not allege that the lease agreement was operative during those months. Because no lease existed at the time of the alleged breach, even taken as true, the allegations in Count V do not state a claim for relief.

In Count VI, Pourzal alleges that he and Marriott entered into a lease for the Band House. He alleges that the lease agreement included a clause requiring Marriott to maintain and repair the property prior to returning it to Pourzal. Pourzal alleges that Marriott damaged the property and did not repair it before returning it to Pourzal. Pourzal further alleges that he incurred the costs associated with repairing the premises after Marriott vacated the property. Taking the allegations as true, Pourzal has stated a claim for breach of contract.

E. Misrepresentation

1. Intentional misrepresentation.

In Count VII, Pourzal alleges that Marriott made intentional misrepresentations to him regarding the Band House and Chef's House leases. To state a claim for fraud, or misrepresentation,

Pourzal must allege: (1) that Marriott made a representation of a material fact; (2) knowing the representation to be false when it was made; (3) with the intent that Pourzal would act on the statement; and that (4) Pourzal reasonably relied upon the statement; (5) to his detriment. *In re Tutu Water Wells Contamination Litig.*, 32 F. Supp. 2d 800, 805 (D.V.I. 1998) (citing Restatement (Second) of Torts § 530); Restatement (Second) of Torts § 525.

The Federal Rules of Civil Procedure further require that allegations of misrepresentation be pled with specificity. Fed. R. Civ. P. 9(b) ("Rule 9"); *Lum v. Bank of Am.*, 361 F.3d 217, 225 (3d Cir. 2004) (applying Rule 9's requirements to a misrepresentation claim). Rule 9's requirements "may be satisfied if the complaint describes the circumstances of the alleged fraud with 'precise allegations of date, time, or place' or by using some means of 'injecting precision and some measure of substantiation into their allegations of fraud.'" *Bd. of Trs. v. Foodtown, Inc.*, 296 F.3d 164, 172 n.10 (3d Cir. 2002) (citing *Naporano Iron & Metal Co. v. Am. Crane Corp.*, 79 F. Supp. 2d 494, 511 (D.N.J. 1999)); see also *Rolo v. City Inv. Co. Liquidating Trust*, 155 F.3d 644, 658-59 (3d Cir. 1998) (noting that allegations of fraud must state "who misrepresented and concealed the information, when and how"). Allegations of

misrepresentation must also describe why or how the representations were false when they were made. *See Charleswell v. Chase Manhattan Bank, N.A.*, 308 F. Supp. 2d 545, 569-70 (D.V.I. 2004) (holding that an allegation of fraud that included a specific date on which a company sent out letters containing information it allegedly knew was false at the time of the mailing was sufficiently specific to satisfy Rule 9(b)).

Pourzal has alleged that Marriott represented that it would enter into a four-year lease for the Chef's House and the Band House properties if Pourzal undertook certain repairs and renovations. Pourzal alleges that the representations were made by Jane Hillner, an authorized agent of Marriott. He alleges that Marriott intended that Pourzal would rely on these representations. Pourzal further alleges that he relied on Marriott's statements to his detriment, and that Marriott's later repudiation of the alleged agreement revealed the fraud.

These allegations do not include dates or any other indication as to when, specifically, the alleged representations occurred. *Cf. id.* at 569 (finding allegations that specific letters mailed out by an insurance company on specific days contained false information satisfied Rule 9's specificity requirements). Accordingly, the allegations in Count VII of the

Complaint fail to satisfy the requirements of specificity set forth in Federal Rule of Civil Procedure 9(b).

Even if they were sufficiently specific, the allegations in Count VII fail to state a claim for misrepresentation. Pourzal alleges that Marriott represented that it would enter into long-term lease agreements with Pourzal, and that Marriott's later repudiation of this representation constituted tortious misrepresentation. However, subsequently repudiating an agreement does not constitute misrepresentation if one party intended to perform at the time the promise was made. See, e.g., *Seale v. Citizens Sav. & Loan Asso.*, 806 F.2d 99, 106 (6th Cir. 1986) (noting that a "later repudiation [by a party to an alleged agreement] of an agreement it intended to perform at the time the promise was made would not be actionable" as a fraud or misrepresentation claim). The Complaint contains no facts or allegations that indicate whether Marriott intended to perform at the time when the agreement was made. Accordingly, Count VII will be dismissed.⁵

⁵ Because Pourzal has failed to sufficiently plead his claim for misrepresentation, Marriott's argument that the misrepresentation and negligent misrepresentation claims are barred by the statute of limitations need not be addressed.

2. Negligent misrepresentation.

In Count VIII, Pourzal alleges that Marriott was negligent with respect to its misrepresentations regarding the Band House and Chef's House leases. To state a claim for negligent misrepresentation, Pourzal must allege that: (1) Marriott made a representation that was false; (2) Marriott should have known the representation was false; (2) Pourzal relied upon the representation Marriott provided; (3) Pourzal suffered pecuniary loss as a result of its justifiable reliance upon the information; and (4) Marriott failed to exercise reasonable care or competence in obtaining or communicating the information. See *In re Tutu Water*, 32 F. Supp. 2d at 807 (citing Restatement (Second) of Torts § 552). The representation must also be false when it is made. *Charleswell*, 308 F. Supp. 2d at 568 (quoting *L.E.B. Enters., Inc. v. Barclays Bank, P.L.C.*, 33 V.I. 42, 46 (Terr. Ct. 1995)).

As in Count VII of the Complaint, in Count VIII Pourzal alleges that Marriott represented that it would enter into four-year leases with Pourzal for both the Band House and the Chef's House if Pourzal undertook certain actions. Pourzal further alleges that Marriott knew, or that it should have known, that Pourzal would rely on its statements. Critically, however, Pourzal has not pled that Marriott's representations were false

when they were made. See *Charleswell*, 308 F. Supp. 2d at 568 (noting that "the tort of negligent misrepresentation requires an express representation which is false or misleading at the time it is made.'" (quoting *L.E.B. Enters., Inc.* 33 V.I. at 46). Because Pourzal has failed to state a claim for negligent misrepresentation, Count VIII will be dismissed.

III. CONCLUSION

Accordingly, for the reasons discussed above, Marriott's motion to dismiss Counts I, II, III and VI of the Complaint will be denied. Marriott's motion to dismiss Counts IV, V, VII, and VIII of the Complaint will be granted. An appropriate order follows.

ENTERED this 17th day of August, 2006.

FOR THE COURT:

_____/s/_____
Curtis V. Gómez
Chief Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____
Deputy Clerk

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NICK POURZAL,)
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For the defendant Blackacre Capital Management

Bennet Chan, Esq.
For the defendant Capital Hotel Management, LLC

Maria Tankenson Hodge, Esq.

For the third-party defendant Prime Hospitality Corp.

ORDER

GÓMEZ, Chief J.

AND NOW, for the reasons more fully stated in the Memorandum of even date, it is hereby

ORDERED that the motion of Marriot International ("Marriott"), to dismiss Counts I, II, III, and VI of the Revised Third Amended Complaint (the "Complaint") of the plaintiff, Nick Pourzal is **DENIED**; it is further

ORDERED that Marriott's motion to dismiss Counts IV, V, VII, and VIII of the Complaint is **GRANTED**.

ENTERED this 17th day of August, 2006.

FOR THE COURT:

_____/s/_____
Curtis V. Gómez
Chief Judge

Deputy Clerk

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____

Pourzal v. Marriott
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ORDER
Page 3

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